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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-266
	)	
	)	
Rate Regulation	)	

OPPOSITION TO PETITION FOR RECONSIDERATION

The National Cable Television Association, Inc. ("NCTA"), by its attorneys, hereby submits its Opposition to the Petition for Reconsideration filed by New York Telephone Company and New England Telephone and Telegraph Company ("NYNEX") in the above-captioned proceeding. NYNEX seeks reconsideration of the Commission's decision in its Second Report and Order[1] not to exclude cable systems with penetration below 30 percent from its benchmark calculations. NYNEX's arguments have already been fully considered -- and rejected -- by the Commission. Nothing contained in NYNEX's petition warrants reconsideration of the entirely appropriate decision to keep low penetration systems in the sample of systems from which the FCC derived its benchmark.

DISCUSSION

NYNEX challenges the FCC's decision on two grounds. First, it asserts that the Commission erroneously believed that it could not pick and choose which systems, defined by Congress as facing effective competition, should be included in the benchmark calculation.

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[1] Second Report and Order, MM Docket No. 92-266 (rel. Aug. 27, 1993).

Second, it claims that the Commission wrongly concluded that there was no reason to exclude low penetration systems from the benchmark analysis. Both these arguments were specifically rejected by the Commission in its Second Report and Order. NYNEX's Petition raises nothing new.

I. The Act Precludes Exclusion of Systems With Less Than 30 Percent Penetration

In its Second Report and Order, the Commission concluded that all systems defined by Congress to face "effective competition" -- including low penetration systems -- should continue to be included in the benchmark calculations.[2] The Commission found, among other things, that "[t]he statutory definition controls when determining reasonable or unreasonable rates pursuant to Section 623 of the Act based on our benchmark approach."[3] To be "most consistent with the clear statutory language", the Commission reasoned, "cable systems with less than 30 percent penetration should continue to be included in the sample of systems subject to effective competition which is used to calculate the benchmark rates."[4]

NYNEX contends, however that the Commission mistakenly believed that it did not have the power to exclude low penetration systems. According to NYNEX, "[e]xcluding low penetration systems from the benchmark does not require the Commission to redefine 'effective competition'. 'Effective competition' is only relevant to one out of seven criteria listed in §623(b)(2)(C). Thus, it is quite clear that under the statutory language the Commission has the power to fashion its benchmark to exclude low penetration systems."[5]

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2 The term "effective competition" is defined to mean, inter alia, that "fewer than 30 percent of the households in the franchise area subscribe to the cable service of a cable system". Section 623 (l)(1).

3 Second Report and Order at ¶128. The FCC recognized that the decision in ACLU v. FCC, 823 F.2d 1554 (D.C. Cir. 1987), cert. denied, 485 U.S. 959 (1988), addressed a question quite similar to that present here, and found that the FCC could not redefine a term defined in the 1984 Cable Act.

4 Id.

5 NYNEX Petition at 2.

But NYNEX, not the Commission, is mistaken in its interpretation. Section 623(b)(2)(C), to be sure, lists several factors to be considered by the Commission in deriving its rate regulation. But those factors include rates charged by systems subject to "effective competition."[6] And, having determined to place primary reliance on the rates charged by systems facing effective competition in deriving its benchmark rates,[7] the FCC is simply not at liberty to exclude low penetration systems from that definition.[8]

Moreover, NYNEX's argument ignores the statutory mandate that rates -- at least basic rates -- reflect those that would be charged by a system if it were subject to effective competition.[9] Therefore, as we explained in our earlier comments,[10] it is not simply that the Commission must consider the rates of all systems subject to effective competition in calculating its benchmarks. The point of the benchmark approach, as explained by the Commission, is to ensure that rates approximate those of systems that are subject to effective competition. Only by including all systems subject to "effective competition" -- a term clearly

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6 Sections 623(b)(2)(C)(i); 623(c)(2)(B).

7 The Commission reaffirmed on reconsideration "[t]hat the Rate Order properly placed primary weight on rates of systems subject to effective competition in fashioning the benchmark approach." First Order on Reconsideration, MM Docket No. 92-266 at ¶12 (rel. Aug. 12, 1993).

8 Even if the Commission had not reaffirmed its conclusion to primarily rely on effectively competitive systems from among the factors contained in the statute, NYNEX fails to explain how reliance on the additional factors mentioned in the Act would support its conclusion that the rates charged by low penetration systems should be automatically rejected in deriving benchmark rates.

9 See Section 623(b)(1): "Such regulation shall be designed to achieve the goal of protecting subscribers of every cable system that is not subject to effective competition from rates for the basic tier that exceed the rtes that would be charged for the basic service tier if such cable system were subject to effective competition" (emphasis added).

10 Reply Comments of the National Cable Television Association, MM Docket No. 92-266 at 4 (filed July 2, 1993).

defined in the Act -- in the benchmark analysis can the Commission ensure that the resulting benchmarks reflect the rates of all those systems identified by Congress.

If the Commission excluded rates of systems with less than 30 percent penetration from its benchmark analysis, it would, in effect, be designing the benchmarks to reflect rates of systems that it defined as subject to effective competition -- rather than to reflect rates for systems that the Act defines as subject to effective competition. This, as a matter of law, it may not do.[11]

II. No Basis Exists for Giving Low Penetration Systems Lesser Weight in the Benchmark Calculations

A second basis for the Commission's determination that low penetration systems should be included in its benchmark calculations rested on its finding that "even if the Act's 'effective competition' definition were not binding on the Commission,. . . . the commenters have not presented convincing arguments as to why low penetration systems should be excluded from the sample."[12] NYNEX claims that this statement, too, is incorrect. But NYNEX's Petition contains only bald statements as to why low penetration systems should be excluded that are equally unconvincing and unsupported as the earlier arguments specifically rejected by the Commission. As the Commission there found, upon an examination of the entire record, "while many commenters speculate about various reasons why systems with less than 30 percent penetration might have higher rates than other competitive systems, there is no factual support for their contentions or upon which the Commission could conclude that exclusion of rates for such systems from the benchmark would produce a 'better' measure of the competitive rate differential."[13]

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[11] Id.; ACLU, supra.

[12] Second Report and Order at ¶129.

[13] Id.

Nevertheless, NYNEX goes so far as to now claim that "the Commission must exclude low penetration systems to fulfill Congress' mandate of limiting cable market power and ensuring reasonable cable rates."[14] But NYNEX Petition presentes no evidence that low penetration systems have market power or charge unreasonable rates.[15] Low penetration systems may well have higher than average costs, which would explain their higher than average rates. Moreover, as we explained in our earlier comments, the mere fact that the rates of low penetration systems are higher than those of municipally-owned systems and systems facing head-to-head competition does not, in itself, indicate that rates of low penetration systems are supracompetitive -- because the rates of the other systems may be lower than competitive levels.[16] And, as the FCC itself recognized,[17] economic theory supports the notion that cable systems with less than 30 percent penetration are unable to exert substantial market power, and their rates should approximate rates charged by competitive systems.[18]

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[14] NYNEX Petition at 4.

[15] To the extent that NYNEX again relies on its affidavit of Thomas W. Hazlett, attached to the Joint Comments of Bell Atlantic, GTE, and the NYNEX Telephone Companies (filed June 17, 1993), the Hazlett Affidavit contains serious deficiencies and hardly establishes either of these propositions. See Attachment to NCTA's Reply Comments, "Comments on Hazlett Analysis" (filed July 2, 1993).

[16] See NCTA Reply Comments at 9.

[17] Second Report and Order at ¶129.

[18] NYNEX argues that Congress' exempted low penetration systems from rate regulation to relieve small systems "from the burdens of regulation", and not because they lack market power. But Congress specifically addressed small systems in a separate provision of this section. See Section 623(i).

The Commission was right in concluding that "[i]t would not serve the public interest to exclude low penetration systems from the benchmark calculation . . . merely because such exclusion would result in larger rate reductions which those commenters seek."[19] Nothing in NYNEX's Petition warrants altering that conclusion. NYNEX's Petition should be denied.

Respectfully submitted,

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[19] Second Report and Order at ¶130.

Certificate of Service

I, Tonya K. Bartley, hereby certify that a copy of the foregoing **"Opposition To Petition for Reconsideration"** was served this 24th day of November 1993, by first-class mail, postage prepaid to the following:

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